

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA HYTCHE)	
Claimant)	
VS.)	
)	Docket No. 217,680
BOEING COMPANY)	
Respondent)	
AND)	
)	
KEMPER INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals from the Award issued by Administrative Law Judge Nelsonna Potts Barnes on September 28, 1999. In the Award, the Administrative Law Judge denied claimant additional benefits beyond the medical treatment provided, finding that claimant had not met her burden of proving that she had sustained an increase in permanent impairment. Oral argument was held on January 14, 2000.

APPEARANCES

Claimant appeared by her attorney, Michael L. Snider of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas. Attorney Vaughn Burkholder did not appear for respondent as this matter was consolidated with Docket No. 192,434 for oral argument. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge were considered by the Appeals Board for the purposes of this award.

ISSUES

- (1) Did the Administrative Law Judge err in failing to require the doctors to use the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, as required by statute?
- (2) What is the nature and extent of claimant's injury and/or disability? Is claimant entitled to a modification of the original Award of July 22, 1996?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant originally suffered accidental injury to her bilateral upper extremities through a series of accidents from March 1, 1994, through January 31, 1996. That case is Docket No. 192,434. In an Award dated July 22, 1996, Special Administrative Law Judge Michael T. Harris awarded claimant a 7 percent permanent partial disability to the body as a whole. On November 12, 1996, claimant filed an Application for Review and Modification, requesting the court consider, under K.S.A. 44-528, whether claimant was entitled to additional compensation as a result of a worsening of her bilateral upper extremity conditions.

In Docket No. 217,680, claimant filed a new claim, alleging that she had suffered a new series of accidents beginning February 1, 1996, and continuing thereafter.

Claimant was originally provided medical treatment after electrodiagnostic testing done in June 1994 indicated that claimant suffered from severe carpal tunnel syndrome on the right and moderate carpal tunnel syndrome on the left. On January 12, 1995, claimant was examined by George Fluter, M.D., board certified in internal medicine, physical medicine and rehabilitation, and also by the National Board of Medical Examiners. Dr. Fluter diagnosed claimant with bilateral carpal tunnel syndrome, with the right being worse than the left. He also noted some mild de Quervain's tenosynovitis. Claimant had undergone no surgical treatment as of Dr. Fluter's examination. At that time, Dr. Fluter did not believe that claimant's left upper extremity condition warranted surgery. He assessed claimant a 5 percent permanent impairment to the right upper extremity and a 3 percent permanent impairment to the left upper extremity for the carpal tunnel and de Quervain's

conditions. These combined to a 5 percent impairment to the body as a whole pursuant to the AMA Guides, Third Edition (Revised).

Claimant was also examined by board certified orthopedic surgeon Robert A. Rawcliffe, Jr., M.D., on November 2, 1995. Dr. Rawcliffe was also provided the June 1994 electrodiagnostic studies showing severe carpal tunnel syndrome on the right and mild carpal tunnel syndrome on the left. He confirmed that claimant's carpal tunnel syndrome was due to the repetitive work duties performed for respondent. He assessed claimant a 10 percent impairment to the right upper extremity and a 5 percent impairment to the left upper extremity, which converts to a 9 percent whole person impairment. At the time of his examination, claimant's impairment to the left upper extremity was of a "mild degree."

After the original Award, claimant continued working, performing repetitive activities and using vibratory tools, and continued experiencing problems. She was referred to Bernard F. Hearon, M.D., orthopedic surgeon, on September 10, 1996. He diagnosed claimant, through EMG nerve conduction studies, as having bilateral carpal tunnel syndrome. The first study done September 17, 1996, confirmed severe carpal tunnel syndrome on the right. As a result, Dr. Hearon recommended and performed a right carpal tunnel release on November 4, 1996. He followed claimant for approximately five months post surgery, describing her postoperative course of treatment as "benign" and the results from the surgery as satisfactory.

Claimant returned to Dr. Hearon on July 20, 1998, complaining of numbness and tingling on the left side. EMG nerve conduction studies performed on July 30, 1998, indicated that claimant's left carpal tunnel syndrome was now severe. Dr. Hearon recommended a left carpal tunnel release, which was performed on October 5, 1998. He again found her post-surgery recuperation to be "benign" and the treatment results satisfactory. Dr. Hearon opined that, based upon his examinations and treatment of claimant, she suffered no additional functional impairment on a permanent basis.

On cross-examination, Dr. Hearon conceded that claimant's carpal tunnel syndrome on the right side in 1996 involved thenar wasting, or wasting of the muscles at the base of the right thumb. Wasting of the thenar eminence was not diagnosed or described by either Dr. Fluter or Dr. Rawcliffe during their earlier examinations.

Dr. Hearon also noted that the distal sensory latencies performed on claimant's left hand evoked no response, which implied a severe compression of the nerve. Dr. Hearon went on to state that the bilateral carpal tunnel surgeries performed on claimant had been successful and she had been "cured." As a result, he felt she had a zero percent impairment to both upper extremities.

Dr. Hearon performed no nerve conduction studies following the surgeries. He did, however, agree that, if claimant suffered from paresthesia following the surgery, that would

indicate that she may have a permanent impairment. He described paresthesia as being a sensation of numbness and tingling in the extremities. He also stated that he was not aware whether claimant's thenar wasting was permanent. He agreed that patients lose strength after carpal tunnel releases and estimated that they would lose between 5 and 10 percent of their actual grip strength. He stated that that is normal and "goes with the territory." He did not believe it fair to award an impairment for a 5 to 10 percent loss of strength. He acknowledged that the AMA Guides do provide for functional impairments based upon loss of strength, but stated that they are guides only and he chose not to use loss of strength in his determination of impairment in this circumstance.

Dr. Rawcliffe examined claimant a second time on September 9, 1997. This occurred after claimant's right carpal tunnel surgery but before the left carpal tunnel surgery was performed. Dr. Rawcliffe acknowledged that, when he first saw claimant in 1995, she had bilateral carpal tunnel syndrome presurgery. He testified that, when he saw her in 1997, there had been no significant changes in the left upper extremity between 1995 and her 1997 examination. He assessed claimant the same 5 percent impairment to the left upper extremity after the 1997 examination. At the time of his deposition, he expressed surprise that claimant had undergone left upper extremity carpal tunnel surgery after his 1997 examination. Since he had not seen claimant since 1997, he had no idea whether her thenar wasting had continued, improved or worsened. He acknowledged, if her thenar wasting worsened, that would be a significant finding as it would indicate some permanent damage to the motor nerves. This would be more significant than mere sensory losses. Since he had not seen claimant since 1997, he was unable to say, within a reasonable degree of medical certainty, her exact permanent impairment as of his deposition in 1999. He did feel claimant's carpal tunnel symptoms were, at most, in the mild category which is why he assessed claimant a 5 percent impairment to each upper extremity in 1997.

Claimant was also reexamined by Dr. Fluter on June 21, 1999. Dr. Fluter acknowledged that, while he used the AMA Guides during his first examination, he did not utilize the AMA Guides in arriving at an opinion regarding claimant's functional impairment in June 1999. He did, however, assess claimant a 5 percent impairment to the right upper extremity and a 3 percent impairment to the left upper extremity, which he testified was the same as he had assessed claimant in 1995. Dr. Fluter did have the opportunity to examine the July 30, 1998, electrodiagnostic studies done by Ty L. Schwertfeger, M.D. He compared Dr. Schwertfeger's evaluations with the June 13, 1994, diagnostic studies done by Jeanette C. Salone, M.D. Dr. Salone's initial diagnostic studies indicated claimant had moderate to severe carpal tunnel syndrome on the right side and moderate carpal tunnel syndrome on the left. Dr. Schwertfeger's evaluation of claimant's left upper extremity in 1998 indicated severe carpal tunnel syndrome. Dr. Fluter acknowledged that the heavy repetitive work being performed by claimant in 1996 would likely increase her symptomatology. Repetitive work, including the use of vibratory tools, would cause or contribute to carpal tunnel syndrome and would cause a worsening of claimant's

symptoms. His findings in January 1995 indicated normal muscle strength and bulk, with no thenar atrophy. In June 1999, claimant did exhibit some evidence of atrophy of the thenar muscles bilaterally, more on the right than the left. He described the thenar muscles as being the muscles at the base of the thumb. He agreed that, since claimant had surgery in November 1996 to her right upper extremity and still had thenar atrophy on the right side as of the 1999 examination, the thenar atrophy was probably permanent. He did not believe claimant would be able to rebuild the muscles at the base of her thumb. He acknowledged there had been a worsening of claimant's condition since he last examined her. Nevertheless, he provided claimant with the identical functional impairment he had assessed in 1995.

Dr. Fluter was questioned regarding diagnostic testing performed by Lawrence R. Blaty, M.D., on September 17, 1996. The electromyographic studies at that time showed fibrillation and sharp wave, suggestive of denervation. Dr. Fluter agreed that the tests indicated signs of nerve impairment and could indicate the actual destruction of nerve tissue. He also stated that the most objective method of determining the degree of nerve dysfunction would be to repeat the nerve conduction tests for both upper extremities. This had not been done at the time of his deposition. At the time of his examination of claimant in 1999, she continued experiencing pain in both upper extremities and hands. He testified that, if he followed the AMA Guides, claimant would have at least a 10 percent permanent partial impairment to each upper extremity. He went on to state that he did not agree with the AMA Guides, feeling that their rating system was excessive. In converting the 10 percent upper extremity impairments, this would be a combined 12 percent whole person impairment.

On December 29, 1998, claimant was examined at her attorney's request by P. Brent Koprivica, M.D., board certified in emergency medicine and occupational medicine. Dr. Koprivica reviewed the electrodiagnostic studies performed by Dr. Blaty in 1996, finding claimant's condition had clearly worsened. Dr. Blaty had also found evidence of thenar atrophy, worse on the right than the left, resulting from her carpal tunnel conditions. Dr. Koprivica testified that, even though claimant had had surgery to prevent a progression of the atrophy, the damage to the nerves was irreversible. He noted that claimant's carpal tunnel syndrome on the left had progressed from mild to severe, indicating a significant change over the course of several years. Dr. Koprivica assessed claimant a 30 percent whole person impairment as a result of the bilateral carpal tunnel syndrome in December 1998. He stated that his opinion would not vary whether using the Fourth Edition of the AMA Guides or the Third Edition (Revised). He did note that, in reviewing the medical records, he would have assigned claimant a 12 percent whole person impairment as of 1995 for the bilateral carpal tunnel syndrome.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish his or her right to an award for the benefits requested by a preponderance of the credible evidence. See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

The medical evidence discloses a worsening of claimant's bilateral carpal tunnel conditions after she returned to work following her original series of injuries through January 1996. Claimant underwent bilateral carpal tunnel surgery after encountering a worsening of her symptoms. The examinations and electrodiagnostic studies performed in 1994, 1996 and 1998 documented a worsening of claimant's carpal tunnel syndrome from moderate to severe, and also displayed evidence of thenar atrophy bilaterally with the right being worse than the left. The final electrodiagnostic studies performed by Dr. Schwertfeger in 1998 indicated severe carpal tunnel syndrome on the left which led to claimant's carpal tunnel surgery. The Administrative Law Judge, in reviewing the medical evidence, was persuaded by Dr. Hearon, Dr. Rawcliffe and Dr. Flutter that claimant had failed to prove an increase in her permanent impairment. This finding, while supported by evidence, is not supported by the greater weight of the credible evidence. Dr. Hearon testified that claimant had undergone successful bilateral carpal tunnel surgeries and, as a result, she was "cured." He assessed claimant a zero percent impairment for the bilateral carpal tunnel syndrome. This finding is ludicrous. Claimant testified to having paresthesia in her upper extremities and was diagnosed by more than one physician with thenar atrophy, a clear wasting away of the muscles at the base of her thumbs.

Dr. Rawcliffe attempted to convince the fact-finder that the carpal tunnel surgery to claimant's right upper extremity reduced claimant's functional impairment. While this may, at times, be the end result of surgery, in this instance the claimant's condition from January 1996 through the May 1999 regular hearing clearly deteriorated. The atrophy alone indicates substantial worsening of claimant's carpal tunnel syndrome.

The Appeals Board finds the opinion of Dr. Koprivica to be the most credible and persuasive. Claimant's carpal tunnel condition has obviously worsened. The thenar atrophy shows a wasting away of the muscles at the base of her thumbs bilaterally and the electrodiagnostic studies performed on claimant over the years indicate claimant's condition has gone from moderate to severe on the left and stayed severe on the right. While Dr. Koprivica acknowledged that he would not have assessed claimant a 7 percent impairment at the time of the original Award, but rather would have found claimant to have a 12 percent impairment to the body as a whole, as of his examination on December 29, 1998, he felt, pursuant to the AMA Guides, Fourth Edition, claimant would have a 30 percent whole body functional impairment bilaterally. In computing claimant's current injury attributable to the post-January 31, 1996, insult only, he felt claimant had an additional 25 percent whole person functional impairment. This was based upon the AMA Guides, Fourth Edition, although he acknowledged there would be no difference between

the Fourth Edition and the Third Edition (Revised). The Appeals Board finds the opinion of Dr. Koprivica to be the most credible and adopts same as its own finding.

The Appeals Board, therefore, finds claimant has suffered a new series of injuries after January 31, 1996, resulting from her use of vibratory tools and from the repetitive activities required in her employment. In this regard, the Award of the Administrative Law Judge is affirmed as claimant was found to have suffered an aggravation of her preexisting condition, resulting in a new injury. The Appeals Board, however, modifies the Award of the Administrative Law Judge and finds claimant has suffered a permanent worsening of her condition and, based upon the medical opinion of Dr. Koprivica, finds claimant has suffered an additional 25 percent permanent partial impairment to the body as a whole for the period February 1, 1996, through October 4, 1998, the last day claimant worked prior to her left carpal tunnel surgery. See Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 28, 1999, should be, and is hereby, modified, and claimant is granted an award against respondent, Boeing Company, and its insurance carrier, Kemper Insurance Company, for an injury occurring through October 4, 1998, and based upon an agreed average weekly wage of \$823.23 for a 25 percent permanent partial disability to the body as a whole.

Claimant is entitled to 103.75 weeks permanent partial disability compensation at the rate of \$366 per week totaling \$37,972.50. As of February 8, 2000, claimant is entitled to 70.29 weeks permanent partial disability compensation at the rate of \$366 per week totaling \$25,726.14, which is ordered paid in one lump sum minus amounts previously paid. The remainder shall be paid at the rate of \$366 per week for 33.46 weeks until fully paid or until further order of the Director.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

Deposition Services

Transcript of Regular and Review and Modification hearing	\$115.50
Deposition of Bernard F. Hearon, M.D.	\$217.30
Deposition of George Flutter, M.D.	\$392.50
Deposition of Robert A. Rawcliffe, Jr., M.D.	\$349.40

Hostetler & Associates, Inc.

Deposition of P. Brent Koprivica, M.D.	\$183.90
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IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael L. Snider, Wichita, KS
Vincent A. Burnett, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director